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McCormick Intern. Usa, Inc. v. Shore Appellant's Reply Brief 1 Dckt. 38454

IN THE SUPREME COURT OF THE STATE OF IDAHO

NICHOLAS BOKIDES,

Third-Party Defendant/
Appellant/Cross
Respondent,

vs.

ROBERTA SHORE,

Third-Party Plaintiff/
Respondent/Cross
Appellant.

Supreme Court No. 38454-2011

APPELLANT/CROSS RESPONDENT'S REPLY BRIEF

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho in and for the County of Franklin

Honorable Mitchell W. Brown, District Judge, presiding

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I. REPLY IN SUPPORT OF APPEAL

A. Roberta Shore Has Failed To Mitigate Her Damages.

In his opening brief, Nicholas Bokides ("Bokides"), the third party defendant/appellant, pointed out the trial judge's error in finding that Roberta Shore ("Roberta"), the third party plaintiff/respondent, had no duty to mitigate damages. In response, Roberta Shore repeatedly asserts that the district court's decision was based upon substantial evidence. However, Bokides asks the Court to focus on four critical facts that he believes require a finding that Roberta failed to reasonably pursue mitigation of her damages. ***First***, although she argues to the contrary, the decree of divorce required Bill Shore ("Bill") to defend and hold Roberta harmless from any indebtedness "related to the closely held corporation Bear River Farm Equipment, Inc., including but not limited, to any claims or litigation against the parties arising out of the business operated by Bear River Farm Equipment, Inc. including attorney fees and costs." R. at 604, *Findings of Fact* ¶ 16. The claims by McCormick clearly fall within this provision. Bill even admitted in his discovery responses that he had agreed to "indemnify Roberta Shore from the claims" alleged by McCormick against Roberta and himself. R. at 98-101, *William Shore's Responses to Third Party Defendant's First Combined Discovery Requests* at 9-10. And, the trial judge acknowledged Bill's duty to defend and indemnify Roberta. R. at 608-209. ***Second***, Roberta failed to even respond to McCormick's motion for summary judgment or file a third-party complaint against Bill. She did absolutely nothing to defend herself against McCormick. In fact, she made a decision not to pursue any claim against Bill notwithstanding the provision in the divorce decree before discovering Bokides' negligence.

Again, the trial judge acknowledged this fact as well. *Id.* at 15. ***Third***, in February of 2010, Bill prepared a financial statement in response to discovery requests propounded by Bokides. Tr., p. 107, L. 23, p. 108, L. 8, Exhibit 113. As of February 2010, Bill estimated that his net worth, after subtracting all current liabilities from his total assets, was $230,920. Exhibit 113. Bill's net worth in February 2010 would have been sufficient to pay McCormick's $200,000 settlement offer. There is absolutely no evidence that Roberta ever investigated or considered the financial statement and/or pursuing a claim against Bill. This is patently unreasonable because Bill had already admitted he owed a duty to indemnify her. Unlike the above two facts, the trial court did not address Bill's asserted net worth (which may have been substantially higher than $230,000). Instead, the judge assumed that Bill was "judgment proof." *Memorandum Decision* at 16. This assumption was not supported by substantial evidence; indeed, the evidence was to the contrary. ***Fourth***, by the time Bill submitted his financial statement that showed funds available, Roberta was not in a position to pursue a claim against Bill because she and Bill had the same attorney. She could not even ask her attorney to look into a potential claim against Bill because of the relationship. She failed to hire her own counsel or do anything to pursue the claim. The facts demonstrate that Roberta did not pursue or investigate a potential claim based upon Bill's February 2010 financial statement.

"It is well established that the party entitled to the benefit of a contract has a duty to use 'reasonable exertion' to mitigate his damages." *O'Neil v. Vasseur*, 118 Idaho 257, 262, 796 P.2d 134, 139 (Ct. App. 1990). "'The doctrine [of avoidable consequences] requires reasonable effort to mitigate damages. Thus, if reasonable, the efforts need not be successful.'"

Davis v. First Interstate Bank of Idaho, N.A, 115 Idaho 169, 171, 765 P.2d 680, 682 (1988). In January of 2010, Bill admitted that he had a duty to indemnify Roberta. In February of 2010, Bill submitted a financial statement demonstrating that he had assets to cover all or part of McCormick's claims. Roberta unreasonably ignored these two facts. The Court should reverse the district court's ruling and find that Roberta failed to mitigate her damages.

B. The Court Should Overturn the Judgment Against Bokides To Prevent An Unfair Windfall in Roberta's Favor.

As previously argued in his opening brief, Bokides submits that the Court should overturn the entry of judgment in this situation to prevent an unjust windfall in Roberta's favor. In opposition, Roberta argues that this issue was not argued below and that the Court should not consider the argument because there is no dispute that "McCormick has a judgment against Roberta Shore as a direct and proximate result of the negligence/malpractice of Bokides." *Respondent/Cross-Appellant's Brief* at 15. The Court should not consider these arguments.

First, Bokides did submit this argument below. On pages 13 and 14 of his trial brief, Bokides reiterates the arguments contained in his motion for summary judgment, and states that:

> McCormick has the option of pursuing its judgment against either William Shore, Roberta Shore, or both, to the extent one or the other has insufficient funds to satisfy the entire judgment. If McCormick elects to proceed against William Shore, and records its judgment against the property owned by William Shore, which it may, it would to able [sic] foreclose on its claims and sell the property, and receive full reimbursement for its judgment. If McCormick pursues this option, Roberta Shore will suffer no damages.

Trial Brief 14, R. at 500. Bokides has preserved this argument for appeal.

Second, Bokides urges the Court to consider the possibility that Roberta could very well be the beneficiary of a windfall if the Court affirms the judgment entered by Judge Brown. What would prevent McCormick from first attempting to recover from Bill and then going after Roberta for any amount left? In this scenario, McCormick may only seek to collect a portion of the total amount owed if it recovers some amounts from Bill. In addition, what would prevent Roberta from paying off the McCormick judgment from the Bokides judgment and then going after Bill for indemnity under the separation agreement? Under either of these scenarios, Roberta would end up with money in her pocket, making a profit off of this lawsuit. It would give Roberta "a windfall opportunity to fare better as a result of [Bokides'] negligence than [she] would have fared if [Bokides] had exercised reasonable care." *Paterek v. Petersen*, 118 Ohio St. 3d 503, 508 (Ohio 2008). The Court should not allow this to occur.

II. REBUTTAL TO CROSS APPEAL

A. The District Court Properly Excluded the Tractor Financed Prior to the Entry of the Divorce Decree from the Judgment.

The district court properly excluded the tractor financed prior to the entry of the divorce decree from the judgment. The McCormick judgment includes eight (8) tractors/farm implements floored or financed by Bear River though Agricredit. One of the tractors was floored prior to the conclusion of the divorce. Therefore, the district court, after applying the legal standard set forth in *Sohn v. Foley*, 125 Idaho 168, 868 P.2d 496 (1994), concluded that Roberta would have been liable pursuant to the guaranties for said tractor and that portion of the McCormick judgment was not proximately caused by Bokides' negligence. R. at 608.

As part of the divorce proceedings, Bokides agreed to notify Agricredit and McCormick in writing that Roberta would no longer guarantee the obligations of Bear River. However, there was no agreement or understanding as to when the notice should be sent, and Roberta did not specify a specific date or timeline as to when written notice terminating the guarantees should be sent to Agricredit. R. at 603, Tr., p. 13, L. 23 – p. 14, L. 4. Roberta testified that at the time she requested that Bokides notify the creditors, there were no exigent circumstances that concerned her about being removed immediately from the guarantees. R. at 603, Tr., p. 45, L. 10 – 19. Roberta acknowledged that she expected the letters terminating the guarantees would be sent by the time the divorce was completed. R. at 603., Tr., p. 44, L. 19 – p. 45, L. 1.

The guaranty agreements executed by Roberta provide that she unconditionally guaranteed all credit amounts extended to Bear River until she terminated the guarantees. R. at 37, 180, 247-48. In October of 2006, Bear River financed one tractor, serial number JJE2026767. Pursuant to the terms of the financing document, Bear River incurred the liability for the tractor, and a duty to satisfy the obligation, when the tractor was financed. Of the total amount of the McCormick judgment, $43,331.89 was for the tractor financed prior to the entry of the divorce decree.

As no time frame was established between Bokides and Roberta to notify the creditors, the district court relied on *Weinstein v. Prudential Property & Casualty Insurance Co.*, 149 Idaho 299, 233 P.3d 1221 (2010), which holds that where no time of performance is expressed, the law implies a reasonable time "as determined by the subject matter of the contract,

the situation of the parties, and the circumstances attending the performance." 149 Idaho 299, 318, 233 P.3d 1221, 1240 (2010). In determining what constituted a reasonable time, the Court considered Roberta's testimony that there were no exigent circumstances that would have required notice to have been made immediately and her testimony that the notices were to be sent during the course of the divorce, or by the time the divorce was completed. R. at 603, 606. Based on these factors and others, the district court concluded that the "reasonable time" for Bokides to have notified the creditors "would have been by the conclusion of the divorce." R. at 607. The district court further held that "the portion of the McCormick judgment relating to the tractor financed prior to November 16, 2007, was not proximately caused by Bokides' breach." R. at 607.

Roberta argues the court's decision is erroneous and that a reasonable time "should have been no more than sixty (60) days" after she requested Bokides to notify the creditors. However, Roberta has presented no evidence or legal argument to support this arbitrarily imposed time period. While an attorney has a duty to follow his client's instructions with reasonable promptness and care, Roberta presented no expert evidence, as required by Idaho law, to establish what would constitute the reasonable promptness and care required of Bokides after he agreed to notify the creditors. *See Samuel v. Hepworth, Nungester & Lezamiz*, 134 Idaho 84, 89, 996 P.2d 303 (2000).

Further, Roberta does not dispute that there was no agreed upon time for Bokides to notify her creditors. R. at 603. Her understanding was only that the creditors would be notified as part of the divorce. She argues that "it was completely arbitrary to select the divorce

decree as the implied time of performance." While it is easy in retrospect to say that Bokides should have notified the creditors earlier, the facts and circumstances at the time of the agreement dictated that such was not required and that providing notice as part of the dissolution of the marital relationship was reasonable.

The district court correctly concluded that the damages sustained by Roberta related to the tractor financed prior to the entry of the divorce decree were not proximately caused by Bokides' negligence. For the foregoing reasons, Bokides respectfully requests that the district court's decision to exclude the financing cost associated with the one tractor be affirmed.

B. Request for Attorney Fees and Costs On Appeal.

Attorney fees are available on appeal under Idaho Code Section 12-121 and Rule 41 of the Idaho Appellate Rules only if the appeal was brought or defended frivolously, unreasonably, or without foundation. *Hogg v. Wolske*, 142 Idaho 549, 559, 130 P.3d 1087, 1097 (2006). Roberta Shore is not entitled to attorney fees on appeal, as Bokides' appeal and defense of the cross claim were not frivolous, unreasonable, or without foundation.

As previously set forth in Appellant's Brief, Bokides, as the prevailing party, is entitled to an award of attorney's fees and costs to defend against Roberta's cross-claim pursuant to Idaho Code Section 12-120(3) and Idaho Appellate Rules 40 and 41.

III. CONCLUSION

Based on the foregoing points and authorities, Bokides respectfully requests that the judgment in Roberta Shore's favor should be reversed in all respects and the matter remanded to the district court for further proceedings on the issues of whether Roberta mitigated

her damages, whether it would have been futile to pursue Bill, and whether Roberta has been damaged.

Bokides also respectfully requests that the Court affirm the district court's decision excluding the tractor financed prior to the entry of the divorce decree from the judgment, as the district court's conclusions as to what constituted a reasonable time to notify the creditors is supported by substantial evidence.

DATED this 30th day of August, 2011.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of August, 2011, I caused a true and correct copy of the foregoing **APPELLANT/CROSS RESPONDENT'S REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

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